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January 6, 2003

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Ex Parte* Submission; UNE Triennial Review, CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

Alaska Communications Systems Group, Inc. and its operating subsidiaries, ACS of Alaska, Inc., ACS of Anchorage, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc. (collectively "ACS") through their attorneys, hereby submit this *ex parte* letter to urge the Commission to amend its rules in the above mentioned dockets ("UNE Review Proceeding") such that incumbent local exchange carriers ("ILECs") other than Bell operating companies ("BOCs") are offered appropriate relief from unbundling requirements in markets where there are high levels of competition. Amending its rules in this manner would allow the Commission to come into compliance with the D.C. Circuit's mandate in *USTA v. FCC* to refine the "impairment" standard.[1]

The Alaska telephone market is the only state that has never been served by a BOC. The unique history of the Alaska local exchange market and the unprecedented, high levels of competition in the local markets in Alaska demonstrate the need for meaningful relief from unbundling requirements once competitive local exchange carriers ("CLECs") are no longer "impaired" as contemplated under the statute. General Communication, Inc. ("GCI"), the most successful CLEC in Alaska and perhaps the nation,[2] has proven its ability to take advantage

[1] *See USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[2] The Commission has found that ACS' predecessor, ATU Telecommunications, faced substantial competition in Anchorage, warranting grant of pricing flexibility. *See ATU Telecommunications*

of rules designed to encourage new entrants to compete with the BOCs. GCI has leveraged the advantages provided to CLECs under today's laws to effectively control the market and position itself to become the dominant local service provider by putting the ACS ILECs out of business. Moreover, the types of relief suggested by other parties would be ineffectual for non-BOC carriers, such as ACS, who face substantial competition but are not price-cap regulated and do not serve major metropolitan markets. Additionally, the bulk of the UNEs provided by ACS are UNE loops; thus, any proposal affording relief only to UNE platform will be insufficient for ACS. Therefore, ACS asks that the Commission consider the proposals defining "impairment" in this submission and grant appropriate relief to non-BOC ILECs.

1. The UNE Review Proceeding must produce rules that comply with the D.C. Circuit's order requiring the Commission to define more precisely the impairment standard for CLECs.

Congress intended unbundling and resale obligations and arbitration of interconnection agreements under the Act to be transitional mechanisms to facilitate market entry by new competitors and the transition to facilities-based competition. Thus, unbundling obligations were not intended to continue in place indefinitely. Rather, it was intended that market forces would ultimately govern inter-carrier interconnection arrangements and competition among carriers of relatively equal bargaining power. In order to foster competition in the local telephone industry, Congress instructed the Commission to consider whether failure to provide specific network elements would "impair" the ability of a telecommunications carrier seeking access to provide service.[3] However, under section 251(d)(2) of the Communications Act of 1934 (the "Act"), "impairment" is not synonymous with any increase in a CLEC's costs or a decrease in its profits.[4]

Request for Waiver of Sections 69.106(b) and 69.124(b)(1) of the Commission's Rules, CPD 98-40, Order, FCC 00-379 (rel. Oct. 26, 2000). GCI filed a Petition for Reconsideration on November 27, 2000, which remains pending. Since the Commission's order in 2000, there has been extraordinary growth in competition in Anchorage and in all other significant markets in Alaska, as described below.

[3] 47 U.S.C. § 251(d)(2)(B).

[4] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390-92 (1999). ("In a world of perfect competition, in which all carriers are providing their service at marginal cost, the Commission's total equating of increased cost (or decreased quality) with 'necessity' and 'impairment' might be reasonable; but it has not established the existence of such an ideal world. We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all.")

In *USTA v. FCC*, the D.C. Circuit rejected the Commission's mandate in the Local Competition Order[5] applying unbundling requirements uniformly to all elements in every geographic or customer market, without regard to the state of competitive impairment in any particular market.[6] As a result of the Commission's adoption of one-size-fits-all, national rules for almost every element, "UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have the object of Congress's concern."[7] Thus, the Commission must establish relief from unbundling requirements that is specific to the markets served, including markets served by non-BOC ILECs, to satisfy the D.C. Circuit's mandate that the Commission identify with specificity when a particular CLEC in a particular market would not be "impaired" by the lack of access to one or more UNEs.

2. The level of competition in Alaska's local exchange markets surpasses that in any other U.S. market.

Despite the many logistical and technical issues surrounding provision of telecommunications services throughout Alaska, the Alaska telecommunications market has become the most fiercely competitive in the country. ACS faces its most formidable competition in the local exchange market from GCI, the incumbent cable television and cable modem services provider for 90 percent of Alaska.[8] GCI is also one of two primary providers of long distance service in Alaska, the other being AT&T-Alascom. Together, these two providers control over 85 percent of the retail long distance market in the state of Alaska.[9] GCI also owns one of the two major undersea cables that have available capacity to link Alaska to the lower 48 United States. In addition, by GCI's own declaration, it is the state's largest ISP providing both dial up and broadband services, including cable modem services.[10]

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[5] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 369 (1999) ("Local Competition Order").

[6] *USTA v. FCC*, 290 F.3d at 419.

[7] *Id.* at 422.

[8] *State & Local Actions*, WARREN'S CABLE REGULATION MONITOR (November 26, 2001) (stating that GCI's cable television systems serve approximately 130,000 subscribers, approximately 90 percent of all Alaska households, and its cable plant passes 191,000 homes throughout Alaska).

[9] *Consideration of Reform of Intrastate Interexchange Telecommunications Market Structure and Regulations in Alaska*, Order No. 9, R-98-1, Regulatory Commission of Alaska, at 5 (rel. Apr. 30, 2002).

[10] Comments of General Communication, Inc., CC Docket No. 01-338, CC Docket 96-98, CC Docket 98-147 at 4 (filed Apr. 5, 2002).

Bolstered by its name recognition and its financial resources garnered as the incumbent cable television provider throughout most of Alaska, GCI entered the Anchorage local exchange market in 1997. Only five years after commencing provision of local exchange service, GCI has already gained more than 40 percent of all lines in the Anchorage market (both residential and business) and its market share is still growing.[11] In fact, GCI today provides local exchange service to about the same number of residential customers in Anchorage as ACS. GCI is now poised to make the same competitive gains in the rural markets of Fairbanks and Juneau that GCI achieved in a mere five years in Anchorage.[12] GCI is even entering a host of smaller and more isolated communities through UNEs. One of the key reasons for GCI's success is it is leasing UNE's at a price that is below ACS' cost to operate and maintain these same UNEs. Based on GCI's ever-growing local exchange market share, its well-established and near-dominant presence in Alaska's interexchange markets, its virtual monopoly of the cable television market, it clear dominance in broadband internet access and monopoly control of the market for cable modems, and its below cost rate for facilities, the bargaining power between GCI and ACS has shifted in GCI's favor. This bargaining power is evidenced by GCI's continued practice of raising rates in its monopoly cable business, while pricing retail telephone services at below ACS' incremental cost to provide the UNE loop over which these services are provided. GCI is an aggressive discounter of local exchange services because of the regulatory regime and their monopoly power. Mandatory unbundling is no longer required, as the market has reached and in many cases surpassed the intended competitive scenario Congress envisioned in enacting the unbundling provisions.

Applying the Commission's unbundling requirements, as they stand currently, to the Alaska local exchange markets has proven inadequate to encourage facilities-based competition. The Commission itself has recognized that some competitors may have the ability but not the incentive to build their own facilities because of the availability of UNEs.[13] This is precisely the scenario that has arisen in the Anchorage local exchange markets. GCI, as the

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[11] Mike Chambers, *Lawmakers return for special session on RCA, veterans initiative*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, State and Regional (Jun. 23, 2002). ACS provisions a huge volume of lines to GCI every week and does not anticipate any end to GCI's continued market share growth.

[12] In the fall of 2001, GCI began providing local exchange service in Fairbanks and, in its first nine months of operation, GCI had already garnered a 17% share of the local exchange market. *See ACS of Fairbanks, Inc., Petition for Declaratory Ruling and Other Relief Pursuant to Section 254(e) of the Communications Act, Petition for Declaratory Ruling and Other Relief,* CC Docket No. 96-45, Exhibit B (filed Jul. 24, 2002). Through its continued growth, GCI now has approximately a 20% share of the Fairbanks local exchange market after just one year of operation in Fairbanks.

[13] *See* NPRM at ¶ 23.

incumbent cable service provider, has its own separate facilities; its local cable system passes more than 85% of Alaska households and about half of GCI's potential business customers.[14]

GCI's capability to provide local exchange services over its own facilities is not just theoretical. In Anchorage, where GCI has well over 40 percent of the local exchange market, it is currently providing service over its own facilities for approximately 27% of the lines it serves in this market.[15] GCI has proven its ability to deliver telecommunications over its own fiber network facilities to numerous large commercial buildings and over copper facilities serving copper facilities serving residential customers in one residential subdivision.[16] Finally, as discussed in more detail below, GCI has represented before this Commission and in other public forums that it intends to deploy cable telephony and move the bulk of its customers to its own cable network within the next few years. Any reluctance by GCI to actually deploy cable telephony is not due to technical difficulties as approximately 2 million customers in the nation already receive this service.[17] Therefore, GCI has demonstrated its technical capacity to deploy its own facilities in Anchorage for both commercial and residential service, and its business acumen to garner a substantial market share and effectively control the market. The only remaining reason for GCI to remain on ACS' facilities is that it is much more economic to get access to customers via below-cost UNEs than it is to incur the costs of actually building facilities to its customers.

Under the current rules, GCI has an additional strategic advantage over ACS because GCI can elect either to build facilities for its customers or to lease facilities from ACS depending on which provides the greater economic advantage. GCI has its own switching capability and is collocated in 100% of ACS' Anchorage, Fairbanks and Juneau wire centers. Therefore, GCI has a choice of serving its customers either through wholesale resale, UNE-P, UNE-L, or on its own facilities. ACS does not have the luxury of being able to choose from the least costly form of service. While GCI has little incentive to fully deploy its own facilities as long as it can gain access to below-cost UNEs, GCI has represented that it will pursue cable telephony in Anchorage, Juneau, Fairbanks and surrounding areas.[18] In January 2001, GCI's

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[14] Comments of General Communication, Inc. at 7.

[15] Estimated based on GCI's disclosure in its third quarter 2002 financial reporting and the lines served by GCI over ACS' facilities.

[16] Notably, GCI's customers served over these facilities do not usually have a choice in local exchange service providers because GCI is not required to provide access to ACS or other CLECs over these lines.

[17] *See Federal Communications Commission Releases Data on Local Telephone Competition*, FCC News Release (Dec. 9, 2002).

[18] *See Prefiled Testimony of Gene Strid In Support of GCI's Request for Designation as an "Eligible Telecommunications Carrier" in its Fairbanks, Juneau, Eielson, and Ft. Wainwright Local Exchange Service Areas*, U-01-11 at 5 (Reg. Comm'n of Alaska Jan. 22, 2001).

Chief Executive Officer, Ron Duncan, said, "Within a couple of years, GCI hopes to begin providing local exchange service over the plant of the cable television system, generally referred to as cable telephony."[19] In April of last year, in this very docket, GCI represented that it "plans to migrate its local exchange services to cable" and "plans to begin testing a cable-based telephone system this year. . . ."[20] Further, according to GCI, its existing cable plant passes by "95% of potential residential customers."[21] In its CETC application, GCI explained it should receive universal service fund support because "GCI plans to lease cable plant from GCI Cable to provide cable telephony service."[22] Thus, GCI's public statements indicate that it should have begun the provision of cable telephony service by now, but it has not done so in light of the favorable regulatory and economic conditions associated with UNE-based competition. All the evidence, therefore, points to UNE-based competition impairing the deployment of new technologies and true competition.

In addition to GCI, ACS faces competition from several other CLECs. ACS currently has interconnection agreements in Anchorage, for example, with AT&T Alascom, and TelAlaska, Inc. Further, ACS has agreements pending with Level 3 for interconnection in Anchorage and with KMC Telecom for interconnection with all of ACS' LECs.

3. The provisioning issues cited by GCI in its *ex parte* are groundless.

In its November 21, 2002 *ex parte*, GCI claims that it is impaired, and thus, eligible to continue to purchase below-cost UNEs, citing to several UNE provisioning issues. However, these claims are baseless. GCI's complaints primarily relate to its dissatisfaction with the network as it existed at the time it sought interconnection. In fact, ACS has pursued cutting edge technologies, such as dual-hosting via GR-303 interfaces, in most of the equipment it has deployed most recently. Despite the positive progress made by ACS in making these technologies work for its competitor, GCI complains about the state of ACS' historical plant without making any effort to financially support the upgrades it seeks. The following responds to specific statements made by GCI in the *ex parte* submission:

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[19] *Prefiled Testimony of Ronald A. Duncan In Support of GCI's Request for Designation as an "Eligible Telecommunications Carrier" in its Fairbanks, Juneau, Eielson, and Ft. Wainwright Local Exchange Service Areas*, U-01-11 (Reg. Comm'n of Alaska Jan. 22, 2001).

[20] *Declaration of Frederick W. Hitz in support of Comments of General Communication, Inc.*, CC Docket No. 01-338 at 2 (April 5, 2002).

[21] *Id.* at 3. In addition, GCI claims its cable plant passes by about half of it potential business customers.

[22] *GCI's Response To The Rural Coalition's Comments*, U-01-11 at 5 (Reg. Comm'n of Alaska Feb. 5, 2002). Further, in the *Prefiled Testimony of Gene Strid*, Mr. Strid said, "[W]e are most likely to pursue cable telephony over the cable television facilities which we have in those communities. GCI hopes that it will begin to provide service using these technologies within 2 years."

a. "Except where the ILEC has implemented GR-303 capability . . . it is not possible to gain access to the unbundled loop traffic at the central office prior to switching."[23] "With respect to unbundled switching, for example, non-ILECs sources of switching (such as GCI's own switches) cannot be used if the ILEC has installed a DLC or concentrator that is not GR-303 compatible – at least until GCI develops its own loop facilities."[24]

It is possible for GCI to gain access to the unbundled loop by placing an adjacent DLC and requesting cross-connection at the remote concentrator. Additionally, where technically feasible, GCI can request either integrated multi-hosting with GR-303 system interfaces or universal access.

b. "In some of its central offices in Anchorage, the ILEC, ACS, has implemented GR-303 capability. Elsewhere, however, it has not."[25]

As in Anchorage, and given GCI's anticipated market share gains, GCI can simply collocate at the remote concentrator and cross connect its facilities in a technically feasible manner. In fact, ACS engineers spent time and effort, in response to a GCI request, developing a plan in Fairbanks that would allow an upgrade to an existing facility to allow such cross connection. Once the plan was developed to provide GCI with the type of interconnection it requested, GCI abandoned its request without compensating ACS for its effort. In any event, GCI can and has availed itself of UNE-P rate elements to serve customers in such areas.

c. "[R]econfiguring their networks using DLCs is not the only tactic that ILECs use to avoid loop unbundling requirements."[26]

Prior to local interconnection, ACS installed remote concentrators that are not GR-303 compatible. At the time it requested interconnection, GCI knew of the availability of unbundled loops. Remote concentrators that are not GR-303 compatible are less expensive than those that are compatible. Therefore, it was rational for ACS to deploy non-GR-303 compatible remote concentrators at that time. Currently, ACS generally installs remote concentrators that are GR-303 system compatible. Moreover, ACS has complied with the Commission's rules

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[23] GCI *Ex Parte* Submission in CC Docket 01-338 at 3 (filed Nov. 21, 2002).

[24] GCI *Ex Parte* Submission at 10.

[25] GCI *Ex Parte* Submission at 3.

[26] *Id.* at 4.

regarding network change notifications that impact interconnecting carriers;[27] however, with very few exceptions, GCI has not filed oppositions to the DLC network change notifications.

d. "Telephone service in Anchorage is not a substitute for telephone service in Fairbanks, and telephone service in a neighborhood not served by a non-compliant DLC is not a substitute for telephone service in a neighborhood served by a non-compliant DLC."[28]

By using the term "non-compliant," GCI is attempting to imply that ACS' DLCs are in violation of regulations or are outside of the norm. However, Commission Rule 51.305(a)(3) states that "an incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network: (3) That is at a level of quality that is equal to that which the incumbent LEC provides itself . . . At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network."[29] ACS' deployment and use of remote concentrators are fully consistent with this rule.

The Commission's rules provide three options for interconnection: wholesale, unbundled network elements, or a combination. UNEs are intended to supplement the CLEC's facilities; however, in this case, GCI is advocating that ACS be mandated to build the ACS network to GCI's exact specifications rather than GCI extending its own facilities by collocating a DLC.

e. "[A]lthough ACS for years added service drops or pair gain devices when necessary to create an additional loop, in May 2002, ACS unilaterally ceased doing so."[30] "GCI has suffered from chronic provisioning problems."[31]

ACS is in compliance with RCA orders currently in effect requiring ACS to build facilities for GCI's use and to provide various improved services to GCI. What GCI does not explain is that these orders fail to provide a mechanism to fund these activities. Today, GCI can lease Fairbanks loops that cost ACS in excess of $30 per month for a mere $19 per month. GCI can obtain provisioning services from ACS that cost approximately $35 for less than $10. These conditions have been exacerbated by state regulators electing to extend depreciation service lives and decrease depreciation rates despite increased risk and requirements for the newest and most

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[27] 47 C.F.R. §§ 51.324-.335.

[28] *Id.* at 10.

[29] 47 C.F.R. § 51.305(a)(3).

[30] GCI *Ex Parte* Submission at 4.

[31] GCI *Ex Parte* Submission at 5.

innovative equipment to cope with competition. When the ILEC has only 50% or less of the market, it makes no sense to saddle that single company with 100% of the burden of providing facilities and services. Yet this is what is occurring in Alaska.

Regulators have not yet been able to rewrite the fundamental laws of economics. Yet regulators have not hesitated to attempt to meet GCI's insatiable demands with orders for ACS to perform services or build facilities that inevitably increase ACS' costs. ACS' repeated requests for fair compensation to pay for these services and facilities has been rejected.[32] Neither GCI nor the regulators have explained how ACS is supposed to perform these functions absent sufficient revenue to pay for them. If ACS continues to be subject to regulatory orders to perform more or improved services for GCI and to build GCI's facilities for them, it will be the functional equivalent of being ordered into bankruptcy.

4. The current level of competition in Alaska and the below-cost UNEs, if allowed to continue, are likely to lead to the demise of the ILEC and the rise of the dominant CLEC as the monopoly provider.

The objectives of the Act were to provide improved services at lower costs to consumers. The promise was to achieve these goals through innovative technologies and new efficiencies. Unfortunately, these goals are being undermined by the continued application of the UNE rules, which favor the competitor, even after sustainable competition has been achieved.

ACS cannot deploy new technologies because it continues to be required by the regulators to deploy and invest in the old copper technology, often just for the benefit of CLECs like GCI. CLECs like GCI have little incentive to broadly deploy new technology as long as they can obtain facilities more cheaply from ILECs like ACS. This problem is much greater, however, than ACS simply being required to make its facilities available below its cost. In addition, ACS is being saddled with old technology under a promise of repayment for that investment over a 25-year period through reasonable rates.[33] In the meantime, when the opportunity is ripe, GCI will deploy its cable telephony and, according to its own representations, move as many of its customers as possible to its own network. Under this scenario, many of the facilities ACS has been required by law to build for GCI to serve its customers become stranded and ACS is never able to recover its investment. In essence, having

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[32] *See, e.g., ACS of Anchorage, Inc. and ACS of Fairbanks, Inc., Emergency Petition for Declaratory Ruling and Other Relief Pursuant to Sections 201(b) and 252(e)(5) of the Communications Act*, WC Docket No. 02-201, Memorandum Opinion and Order, DA 02-2787 (rel. Oct. 22, 2002). Similarly, ACS' repeated requests to have its Anchorage interconnection agreement revised has now been pending for more than three years, with no resolution in sight.

[33] While regulators have imposed 25-year depreciation lives on ACS' regulated telephone plant, GCI, as a largely unregulated CLEC, enjoys a 12-year depreciation schedule for similar assets.

bankrolled GCI's expansion, ACS will be left holding a bag of potentially worthless copper facilities. No new technologies will result from this regime, only a more powerful monopoly controlling the cable television, long distance, data and local exchange business.

Like many other ILECs in the nation, ACS is forced to lease its facilities and provide services below its cost. In Fairbanks, for example, ACS is forced to lease a local loop that costs in excess of $30.00 per month for $19.19 per month. In Fairbanks and Juneau, ACS is forced to convert and otherwise provision thousands of facilities for about $10.00 per line even though its costs are approximately $35.00.[34] These kinds of losses can be absorbed in small numbers, but as CLEC market share grows, as it has in Alaska, they become impossible to bear. The broader problem, however, is that even if ILECs such as ACS recovered all of their facilities costs, plus a reasonable profit, they can never sufficiently reduce their costs to compensate for the reduction in access revenue and, for rural properties, reduced USF, which through portability follow the customer to CLECs. Previously, ACS and other ILECs relied on the combination of rate, access, and USF revenue streams to maintain and support the network, and to generate a small profit. Unfortunately, competition does not reduce the cost of maintaining the network. Of the related costs, some go down (for example billing costs may fall as there are fewer customers) but other costs (such as sales and advertising) increase despite the reduced number of customers. Again, ILECs can absorb some of these losses in small doses, but the small doses have come and gone in Alaska. Under this continuing trend, where costs necessarily exceed revenues, ILECs such as ACS have no future as long as the rules of competition remain unchanged.

Competition has already taken its toll on ACS. After five years of competition in Anchorage, ACS' return on investment, excluding directory revenue, is less than two percent (2%) per year and still diminishing. ACS forecasts similar or worse returns when it loses comparable market shares in Fairbanks, Juneau, and other markets subject to competition. At these rates of return, no reasonable investor will contribute more capital. Thus, the only way to comply with the regulators' requirements to delay investment in new services, which ACS has already done. The next step is to allow service levels to fall, which plays right into the hands of a competitor that has a cost advantage. The result: competitive losses accelerate, ACS loses an increasing number of customers and is forced out of business.

It is the very survival of the non-BOC ILEC that is being impaired by the current application of the Act. It is possible that consumers will obtain lower prices through the bankruptcy of ILECs such as ACS and the purchase of deeply discounted assets by another

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[34] GCI pays ACS a little less than $10 for converting an ACS customer to a UNE-loop customer. ACS' actual costs for these conversions is about $15 for administering the provisioning and about $20 for performing the cross-connect at ACS' central office. Conversions to wholesale or UNE-P save ACS the CO cost, but the cost to ACS for administering the provisioning remains at about $15; for these types of conversions, however, GCI pays ACS only about $1.

company. Such a public policy, however, would be short-sighted and detrimental to consumers, as investors would lose confidence and become unwilling to invest in this sector. Ultimately, this threatens universal service for the highest-cost customers.

ACS requests that the FCC lift the unbundling rules which threaten ACS with financial disaster. ACS should not be required to support a competitor that has proven to be formidable and successful and no longer needs the special privileges and advantages designed to encourage new entrants in a BOC-dominated world. GCI has demonstrated its ability to deploy facilities that promise to strand much of ACS' network within the next few years. GCI has failed to demonstrate it would be "impaired" in providing the services it seeks to offer if it had to build facilities or purchase them at market prices in arms' length negotiations with ACS. ACS' financial viability and very existence is threatened if it must continue to provide old technology to successful CLECs at below-cost rates. It is time for the FCC to recognize that ACS should be relieved from the obligation to provide below-cost UNEs, so that it is allowed a fair chance to compete.

5. The types of relief from unbundling proposed by other parties are inappropriate for non-BOC ILECs.

The recent *ex parte* submissions in the UNE Review Proceeding propose different types of relief from unbundling obligations, however, none adequately address the circumstances in the Alaska local exchange market. For instance, some BOCs have proposed elimination of unbundling obligations for high-capacity loops and transport in markets where the Commission has granted pricing flexibility.[35] However, carriers such as ACS that are not price cap carriers would not be eligible for such relief as they do not have the same pricing flexibility as price cap LECs.

BellSouth and Time Warner have proposed removal of the dedicated transport UNE where there are three or more competitive transport providers that serve either the "A or Z" wire center, and alternatively, have proposed to provide relief specifically to the top 100 MSAs.[36] In addition, many CLECs have proposed competitive triggers based on the existence of four or five competitive providers at both the wire center and the end point.[37] Smaller ILECs typically do not serve in the top 100 markets and are unlikely to face competition from so many CLECs. As demonstrated in the Anchorage market, markets served by smaller ILECs can develop significant competition from one competitor that serves a substantial portion of the

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[35] *See* Verizon *Ex Parte* Submissions in CC Docket 01-338 (filed Oct. 22, 2002 and Nov. 15, 2002).

[36] BellSouth/Time Warner *Ex Parte* Submission in CC Docket 01-338 (filed Oct. 31, 2002).

[37] AT&T *Ex Parte* Submission in CC Docket 01-338 (filed Oct. 7, 2002); WorldCom *Ex Parte* Submission in CC Docket 01-338 (filed Oct. 1, 2002); ALTS/Comptel *Ex Parte* Submission in CC Docket 01-338 (filed Oct. 10, 2002); ASCENT *Ex Parte* Submission in CC Docket 01-338 (filed Nov. 22, 2002).

market. Therefore, the Commission should distinguish impairment of a CLEC in markets served by smaller carriers from impairment in markets served by BOCs. Further, many of the BOCs propose relief specifically from UNE-P, however, the bulk of the UNEs that ACS provisions are UNE loops. Consequently, relief from only UNE-P will not afford meaningful relief to ACS.

GCI has proposed that the Commission utilize the Department of Justice Horizontal Merger Guidelines as a standard for impairment.[38] The Merger Guidelines employ the "small but significant and nontransitory increase in price" ("SSNIP") test to determine the parameters of the relevant market, which are inherently difficult to apply in the real world. After establishing the relevant market, the Merger Guidelines require the reviewing agency to evaluate concentration within that market, the potential adverse effects of the exercise of market power, the ability of other firms to enter the relevant market and prevent the exercise of market power, and any efficiencies created by the proposed merger. Thus, the SSNIP test is not a final determinant of a firm's ability to exercise market power within a given market -- nor, indeed, whether a competitor would be "impaired" in any way from lack of access to another carrier's network elements.[39] GCI's suggestion that, the standard for impairment ought to be whether the requesting carrier would have a small but significant and non-transitory "decrease in output of the services it seeks to provide" is also methodologically unsound and enjoys no support in antitrust law or economics. Moreover, while the Merger Guidelines are generally accepted for the analysis of *mergers*, there is no legal precedent for using any aspect of them to analyze the conditions under which a firm should grant a competitor access to its facilities. GCI's proposal is overly complicated to implement, is not consistent with sound economic theory and is a poor proxy to analyze the impact of competition.

Finally, several states have proposed that the Commission defer to the states to add to the existing list of UNEs and increase the unbundling obligations of ILECs, even where the Commission has not found impairment justifying this burden.[40] These proposals are especially inappropriate where substantial competition has been achieved and a CLEC is no longer impaired. The statute simply does not permit a finding by a state agency that there is "impairment" when the FCC has found otherwise. It is the role of the FCC, not the states, to determine whether a UNE meets the "necessary" and "impair" tests under the statute.[41]

Ironically, each of these proposals appears likely to provide relief to a number of BOCs but none of them to ACS of Anchorage. The unprecedented level of competition in the

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[38] GCI *Ex Parte* Submission in CC Docket 01-338 at 2 (filed Nov. 21, 2002).

[39] *See 1992 FTC/DOJ Horizontal Merger Guidelines* at ¶ 1.11.

[40] *See, e.g.,* Kansas Corporation Commission *Ex Parte* Submission in CC Docket 01-338 (filed Oct. 31, 2002); State of Florida Public Service Commission *Ex Parte* Submission in CC Docket 01-338 (filed Oct. 18, 2002).

[41] *See* 47 U.S.C. § 251(c)(3); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

Anchorage market, as described above, sets the stage to begin the transition into lasting facilities-based competition. Here, low-priced UNEs have produced vigorous competitive growth, and the Commission should now allow ACS and its competitors to negotiate for access to each other's networks and allow market forces to govern, as Congress intended.

6. ACS urges the Commission to afford relief to non-BOC carriers facing substantial competition.

The Commission itself has acknowledged the need to "fashion a more targeted approach to unbundling that identifies more precisely the impairment facing requesting carriers."[42] Therefore, in setting the criteria to define impairment, the Commission should adopt a separate standard aimed specifically at markets served by smaller ILECs. There are a number of methods that the Commission could adopt to relieve smaller, non-BOC ILECs facing substantial competition. Described below are several alternatives that the Commission should consider:

a. Market Share Trigger

ACS proposes an exemption for carriers facing substantial competition determined by a specific market share trigger. For example, the Commission could amend its rules to provide that a non-BOC local exchange carrier be exempt from the obligation to provide unbundled network elements, including the arbitration and pricing provisions of section 252 of the Act and in Commission rule section 51.319, with respect to a CLEC providing telecommunications exchange service or exchange access to subscribers of 25% or more of the subscriber lines installed (or 25% of the local exchange revenue base) in the carrier's service area. Once the 25% market trigger has been achieved by a CLEC, the incumbent carrier would no longer be obligated to provide unbundled network elements to the triggering carriers. Alternatively, the incumbent could make unbundled network elements available, but the CLEC would negotiate rates for unbundled elements at market prices. Under this test, CLECs that lack substantial market share could still purchase UNEs at prices established under sections 251 and 252 of the Act, while established CLECs would have a stronger incentive to deploy their own facilities. Furthermore, this rule change would not impact any non-UNE-based form of competition including resale.

b. Collocation Trigger Based on Levels in Pricing Flexibility Order

Although proposals by the BOCs to use grant of pricing flexibility as a trigger for de-listing UNEs does not offer relief to non-price cap carriers, ACS urges the Commission to

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[42] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, FCC 01-361, ¶ 3 (rel. Dec. 20, 2001) ("NPRM").

consider as another alternative test for impairment a trigger based on collocation levels such as those established in the Pricing Flexibility Order. Under this proposal, for example, ACS and other non-BOC ILECs could be relieved from providing UNEs under section 251(c) of the Act with respect to a CLEC that has collocation with competitive transport in 50% of the wire centers or in wire centers accounting for 65% of the revenue from the ILEC's local exchange services.

c. Consumer Choice Trigger

ACS proposes relief from section 251 unbundling requirements with respect to a CLEC in markets where consumers have a choice of facilities-based local exchange providers. Under this proposal, a CLEC will be deemed to be a facilities-based provider in service areas in which it provides local telephone exchange service using its own switching capability.

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ACS believes each of the above proposals would conform the Commission rules to the D.C. Circuit's mandate to implement market specific criteria for the impairment standard.[43]

[43] ACS does not propose to alter either the rural exemption established under section 251(f)(1), or the obligation of the States to suspend or modify a carrier's obligations under sections 251(b) and (c) when the carrier has made the showing required under section 251(f)(2) for 2% carriers.

For the foregoing reasons, ACS respectfully requests that the Commission consider the proposal above in the triennial review of its UNE rules. The Commission should ensure that its UNE "impairment" analysis complies with section 251(d) of the Act and grants effective relief in markets such as Alaska, in which the competitor has a strong foundation. If you have any questions regarding this submission, please do not hesitate to call us at (202) 637-2200.

Respectfully submitted,

Karen Brinkmann /s/

Karen Brinkmann
Elizabeth R. Park

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin
Christopher Libertelli
Matthew Brill
Lisa Zaina
Jordan Goldstein
Daniel Gonzalez
William Maher